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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL AARON WITKIN,

Defendant and Appellant.

C062367

(Super. Ct. No. 08F04688)

Defendant Michael Aaron Witkin entered a negotiated plea of no contest to attempted first degree robbery (Adrien Abeyta) (Pen. Code, §§ 664/211; count one; undesignated section references are to the Penal Code) and assault with a firearm on Mia Zapata (§ 245, subd. (a)(2); count three). In connection with count one, defendant admitted that he personally used a firearm (§ 12022.53, subd. (b)) and inflicted great bodily injury (§ 12022.7, subd. (a)). In connection with count three, defendant admitted that he personally inflicted great bodily injury (§ 12022.7, subd. (a)). Defendant also admitted a prior prison term allegation (§ 667.5, subd. (b)). Defendant entered his pleas and admissions in exchange for dismissal of the

remaining counts and allegations and a sentencing lid of 21 years in state prison.

After denying defendant's motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) and an oral motion to withdraw his plea, the court sentenced defendant to state prison for an aggregate term of 21 years, that is, the upper term of three years for count one plus 10 years for firearm use and three years for the great bodily injury enhancement, and a consecutive one-third the midterm or one year for count three plus three years for the great bodily injury enhancement. The court also imposed a one-year enhancement for the prior prison term.

Defendant appeals. The court granted defendant's request for a certificate of probable cause (§ 1237.5). Defendant contends the trial court erroneously denied his motion to withdraw his plea. We will affirm the judgment.

FACTS

About noon on June 6, 2007, Adrien Abeyta and his girlfriend Mia Zapata heard loud banging on the front door of Abeyta's home. Abeyta opened the door and defendant, armed with a firearm, began to force his way into the home. Abeyta struggled with defendant onto the front porch and yelled for Zapata to get a gun. Defendant pistol-whipped Abeyta in the head. Zapata got a handgun and attempted to fire a shot at defendant but the gun jammed. Defendant then shot Zapata several times. One bullet grazed Abeyta's head.

DISCUSSION

Defendant contends that the trial court erroneously denied his motion to withdraw his plea despite clear and convincing evidence that his plea was not intelligently and voluntarily entered. We reject defendant's claim.

Background

At the hearing to set a new trial date and trial readiness date, the prosecutor stated that an offer of 21 years in state prison was being revoked. The court inquired whether defendant was interested in the offer. Defendant stated he wanted to accept the offer. Noting that defendant faced a life sentence for the attempted robbery and gun enhancement under section 12022.53, subdivision (d), defense counsel stated that she believed there were problems with the victims' credibility since they hid critical evidence in the case and lied to officers when first interviewed. Defense counsel stated that she had discussed the issues "numerous times" with defendant who, she believed, "understands what the risk is." She stated that she had not tried to convince defendant to accept the offer. Based on her conversation with defendant that day, she believed they were going to trial. Defense counsel noted that one victim (Abeyta) "was apparently engaged in the sales of marijuana, as well as hydrocodone, or Vicodin, there at his residence" and that the other victim (Zapata) had "point[ed] a loaded firearm" simultaneously with defendant pointing his at her. The prosecutor disagreed, noting that Zapata's gun jammed and then defendant shot her five times. The court accepted defendant's

pleas and admissions without defense counsel's agreement. Defendant confirmed that he had had enough time to discuss the charges and defenses with defense counsel. Defense counsel confirmed that she had engaged in those discussions with defendant. The court advised defendant of his rights and the consequences of his plea including that defendant was entering a plea to serious felonies or strikes which could be used in future felony sentencing with the possibility of "25 years to life because of these priors." Defendant asked, "Um, so if -- if I -- if there's another offense, will one of the priors be 654'd?" The court responded, "Not necessarily. That would be up to the Judge at the time of sentencing in that case. But not necessarily." Defendant said, "Okay."

Three weeks later, defense counsel advised the court that defendant wished to withdraw his plea. Defendant stated that he did not intend to commit a robbery at the victims' home, he "never hurt anybody," and he was concerned that the plea included convictions for two strike offenses. He wanted a continuance to seek advice from new counsel, possibly a retained attorney. The court then conducted a *Marsden* hearing.

At the *Marsden* hearing, defendant reiterated that he was concerned that he had entered a plea to two strike offenses and that he wanted to consult with private counsel. Defendant stated that he believed there was a lack of evidence with respect to the robbery charge but knew how plea bargaining worked. He also claimed he was "severely ill" and "just wanted to give up, basically." Then he "got better" and decided the

plea bargain was not in his best interests. He complained that he was not on "the same page" with counsel. He entered his plea even though counsel advised against it because he did not feel confident with counsel going forward.

Defense counsel recounted her experience as a criminal defense attorney since 1992, her representation of defendant, and her belief that there were problems with the prosecution's case against defendant. She stated that defendant should not have accepted the prosecution's offer and that she had been prepared for trial. Defendant then added that he had been seeing psychiatrists for some unspecified problems but disagreed with defense counsel's assertion that defendant was trying to have himself declared incompetent in order to delay the proceedings. Defense counsel stated that she had advised defendant he could retain anyone he wanted to represent him.

The trial court denied defendant's *Marsden* motion. The trial court also denied defendant's oral motion to withdraw his plea, without prejudice. The trial court granted defendant a three-week continuance to consult with a private attorney concerning a possible motion to withdraw his plea. No such motion was filed.

When the probation officer interviewed defendant, he reported no medical or psychological issues. In his request for

a certificate of probable cause, defendant did not mention any medical or psychological issues.¹

Analysis

Section 1018 provides, in relevant part, as follows: "On application of the defendant . . . , the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice."

Except for a defendant charged with a capital offense, a defendant may enter a plea without defense counsel's consent. (§ 1018.)

¹ In his request for a certificate of probable cause, defendant stated: "My no contest plea was made under duress and it was the product of threats and coercion by my court appointed counsel and investigator. I was already concerned about my counsel[']s ability to be a competent advocate at trial but every time I indicated to her that it was my intention to remove her as counsel she argued that it would not be in my best interest which turned out to be incorrect. On April First I met with my counsel and a DNA expert. My counsel was attempting to convince me to accept a plea agreement but I told her I was going to trial. On April 7th and 8th I met with my counsel and investigator where I once again told them I was not guilty and I was going to jury trial at both of those meetings. My counsel and investigator told me that my next court date was my last chance to accept the plea agreement and if I did not the deal was going up by 10 + years. My counsel had indicated numerous times that the court would not be willing to remove her as counsel. I was attempting to retain my own counsel at that point as I had no confidence in my counsel[']s ability. I believe my counsel provided ineffective assistance because if it was not for her failings I certainly could have obtained a more favorable result. I only pled no contest because I felt I was being forced to do so."

Good cause to withdraw a plea exists when a defendant has entered a plea as a result of mistake, ignorance, or some other factor overcoming the defendant's exercise of free judgment. (*People v. Cruz* (1974) 12 Cal.3d 562, 566 (*Cruz*); *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1617.) "However, '[a] plea may not be withdrawn simply because the defendant has changed his mind.'" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208 (*Huricks*).)

Although section 1018 is to be liberally construed, good cause for withdrawal of a guilty plea must be shown by clear and convincing evidence. (*People v. Cruz, supra*, 12 Cal.3d at p. 566; see *Huricks, supra*, 32 Cal.App.4th at p. 1207.) Courts are especially cautious in allowing withdrawal of a negotiated plea. (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146.)

"[O]verestim[ing] the strength of the state's case . . . is hardly the type of mistake, ignorance or inadvertence which would permit the withdrawal of a guilty plea." (*People v. Watts* (1977) 67 Cal.App.3d 173, 183.) "'When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. [Citations.] On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. [Citations.]' [Citations.]" (*Ibid.*)

Defendant claimed that he did not hurt anyone, suggesting he made a mistake in evaluating the prosecution's case against him. This "mistake" is not the type which overcomes the

defendant's exercise of free judgment. Defense counsel discussed her concerns about the evidence with defendant but he chose to enter a plea nonetheless. Defendant failed to present clear and convincing evidence in support of his oral motion to withdraw his plea. No documentary evidence was filed in support of the oral motion and there were no written affidavits or declarations under penalty of perjury. During the *Marsden* hearing at which the prosecutor had been barred, defendant and defense counsel made oral statements concerning defendant's plea. At the *Marsden* hearing, defendant was concerned that he had entered a plea to two strike priors. The court advised defendant of the same at the plea hearing and defendant's question about the application of section 654 demonstrates that he understood the consequences. Other than defendant's self-serving statements, there is no evidence of medical or psychological problems overcoming defendant's free exercise of judgment. Defendant claimed no confidence in counsel's ability to proceed to trial. Counsel stated at the plea hearing that she was prepared for trial. The court allowed defendant a three-week continuance to seek the advice of another attorney about a possible motion to withdraw the plea. No motion was filed. The trial court properly denied the oral motion to withdraw the plea.²

² The recent amendments to section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for violent felonies. (§§ 667.5, subd. (c)(8), 2933.1, 4019, subds. (b), (c); stats. 2009, 3d. Ex. Sess. ch. 28, § 50.)

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

HULL, J.

CANTIL-SAKAUYE, J.